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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 568

PINEY COKING COAL LAND COMPANY, A CORPORATION, *Petitioner,*

v.

ERNEST K. JAMES, STATE TAX COMMISSIONER FOR THE STATE OF WEST VIRGINIA, *Respondent.*

BRIEF IN BEHALF OF ERNEST K. JAMES, RESPONDENT, IN OPPOSITION TO GRANTING WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

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JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

SUBJECT INDEX

	Page
Statement	1
Argument	3
No Federal Questions Involved	3
Conclusion	5

AUTHORITIES

Table of Cases

	Page
Barwise *v.* Shepherd, 299 U. S. 33	4
Clement National Bank *v.* Vermont, 231 U. S. 120	5
Deming *v.* Carlisle Packing Co., 226 U. S. 102	4
Ennis Water Works *v.* City of Ennis, 233 U. S. 652	4
Henderson Bridge Co. *v.* Henderson, 173 U. S. 592	5
Kehrer *v.* Stewart, 197 U. S. 60	5
Lake Superior Consolidated Iron Mines *v.* Lord, 271 U. S. 577	5
Moffitt *v.* Kelly, 218 U. S. 400	5
Parker *v.* McLane, 237 U. S. 469	4
United States Fidelity & Guaranty Co. *v.* Oklahoma, 250 U. S. 111	4
Wabash Railroad Co. *v.* Flannigan, 192 U. S. 29	4
Zucht *v.* King, 260 U. S. 174	3

CONSTITUTIONAL PROVISIONS

	Page
Constitution of the United States:	
Article I, Section 10	3, 6
Fourteenth Amendment, Section 1	3, 6

UNITED STATES STATUTES

Judicial Code, Sec. 237, subdiv. (b), Amending Title 28, U. S. C. A., Sec. 344, subdiv. (b)	5

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STATEMENT

It would seem to be the position of counsel, as appears from the petition, that the judgment in this cause of the Supreme Court of Appeals of West Virginia (R. 198-209), is improper and should be vacated and annulled for the reason that no appeal was taken by respondent from a decree of May 18, 1939 (filed May 21, 1939, *nunc pro tunc*) (R. 128-166), pronounced by the Circuit Court of Raleigh County (P. 2, 10, 12-13). It is respectfully urged that an

appeal was taken from the decree of May 18, 1939, as well as the decree of August 23, 1939. It appears from the petition of respondent to the Supreme Court of Appeals of West Virginia for an appeal and supersedeas to the judgment of the Circuit Court of Raleigh County that respondent was "aggrieved by that certain decree of the Circuit Court of Raleigh County, West Virginia, rendered in the above entitled cause on the 23rd day of August, 1939, which decree ratified and confirmed the decree of May 18, 1939, overruling certain exceptions filed by your petitioner to the report of the commissioner in chancery, under date of May 4, 1939; * * * (R. 1-2). Respondent had previously filed exceptions to the report of the commissioner in chancery (R. 122-125), which were overruled by the decree of May 18, 1939, and the report of the commissioner confirmed. The decree of August 23, 1939, confirmed in all respects the decree of May 18, 1939. Hence, since the statutory period of eight months had not expired within which an appeal could have been prosecuted (R. 4, appeal allowed October 2, 1939, four months after the decree of May 18 pronounced), and inasmuch as the decree of August 23, 1939, in all respects confirmed and adjudicated all principles and property rights involved in the decree of May 18, 1939, the legal effect was, of course, to have prosecuted an appeal from the judgment of the Court as to both decrees. Moreover, this point was not raised by petitioners in this cause in the Supreme Court of Appeals of West Virginia, and we submit it cannot properly be raised here, since there has been no adjudication thereof by that Court.

Complaint is made (P. 14-15) that petitioner was enjoined by the decree of December 15, 1938, pronounced by the Circuit Court of Raleigh County, from exercising its right to reenter the demised premises for certain purposes as provided in the lease. Attention in this respect

is called to the fact that no appeal was prosecuted from that decree by petitioner, nor can an appeal now be taken because of lapse of time.

ARGUMENT

No Federal Question Involved

Petitioner alleges that the judgment of the Supreme Court of Appeals of West Virginia (R. 198-209), pronounced in this cause, deciding that the lien of the State of West Virginia for gross sales and consumers' sales taxes, penalties and interest which accrued during the years 1937 and 1938 (R. 1-6), was superior in priority to all rights of petitioner under its coal mining leases (R. 21-63), entered into in 1925 and 1930, and superior and prior to such liens held by petitioner for unpaid rents and royalties, impairs the obligation of contract in violation of Section 10, Article I of the Federal Constitution, and deprives it of property without due process of law, within the meaning of Section 1 of the Fourteenth Amendment to the Federal Constitution (P. 2-3). It must be apparent, we submit, that the allegation of petitioner that the judgment of the Supreme Court of Appeals of West Virginia with respect to the priority of liens accorded the State of West Virginia as being paramount to all other liens violates the contract clause of the Federal Constitution, and does violence to the due process clause of the Fourteenth Amendment to that Constitution, is fictitious and frivolous, and wholly without substance or merit. It presents no substantial Federal question. We understand that it is settled under numerous decisions of this Court that it will decline jurisdiction although the constitutionality of a State law or other Federal question is involved, where it appears such question is not substantial (*Zucht* v. *King*, 260 U. S. 174), or "is of such an unsubstantial nature as to cause it to be devoid of all merit, and

therefore frivolous" (*Deming* v. *Carlisle Packing Co.*, 226 U. S. 102), and that the assertion of a Federal right must not be wholly without foundation, but "must at least have fair color of support (*Parker* v. *McLane*, 237 U. S. 469). Other decisions in which jurisdiction has been denied or appeals dismissed on similar grounds include: *Wabash Railroad Co.* v. *Flannigan*, 192 U. S. 29; *United States Fidelity & Guaranty Co.* v. *Oklahoma*, 250 U. S. 111; *Ennis Water Works* v. *City of Ennis*, 233 U. S. 652.

The State Supreme Court of Appeals, in holding that the lien of the State for its gross sales and consumers' sales taxes was superior to the lien of petitioner under its mining leases, expressly passed upon a Federal question theretofore determined by this Court, and in a manner wholly in accord with the decisions of this Court. In the case of *Barwise* v. *Sheppard*, 299 U. S. 33, this Court considered a statute of the State of Texas imposing a tax on the production of oil and gas. Appellants, lessors of lands from which oil was produced, contended that that part of the act which imposed a tax upon them, since enacted subsequent to the date of the lease, violated the contract clause of the Federal Constitution, and the due process clause of the Fourteenth Amendment. Holding the statute valid, the Court observed:

> "* * * we are of opinion that it is not an arbitrary fiat and does not infringe the due process of law clause of the Fourteenth Amendment." (P. 39)

In disposing of the contention with respect to the contract clause, this Court said:

> "* * * the lease was made in subordination to the power of the State to tax the production of oil and to apportion the tax between the lessors and the lessee. The taxing act does not purport to reach or affect any term of the lease. Plainly no stipulation in the lease can be of any avail as against

> the power of the State to impose the tax, prescribe who shall be under a duty to the State to pay it, and fix the time and mode of payment. And this is true even though it be assumed to be admissible for the lessors and lessee to stipulate as to who, as between themselves, shall ultimately bear the tax. These views are but a reiteration and application of what repeatedly has been held in respect of contracts and their subordination to the taxing power." (P. 40)

The decisions of this Court in accord therewith are numerous: *Kehrer* v. *Stewart,* 197 U. S. 60; *Lake Superior Consolidated Iron Mines* v. *Lord,* 271 U. S. 577; *Clement National Bank* v. *Vermont,* 231 U. S. 120; *Henderson Bridge Co.* v. *Henderson,* 173 U. S. 592; *Moffitt* v. *Kelly,* 218 U. S. 400.

It is respectfully submitted that the decision of the Supreme Court of Appeals of West Virginia, of which complaint is made, is in strict accord with the decisions of this Court upon the same or similar principles, and must, therefore, stand.

CONCLUSION

None of the grounds referred to in Section 5 of Rule 38 of this Court, nor under Judicial Code, subdivision "b" of Section 237, amending U. S. C. A., Title 28, subdivision "b" of Section 344, for awarding a writ of certiorari, are present here. It does not appear from the record presented to this Court that a State Court has decided a Federal question of substance not theretofore determined by this Court, or has decided in any way probably not in accord with applicable decisions of this Court, or that any title, right, privilege or immunity of petitioner under the Constitution is involved. The contention that the decision of the Supreme Court of Appeals

of West Virginia giving priority to the lien for consumers' sales and gross sales taxes over the lien of petitioner under its mining leases impairs the obligation of contract in violation of Section 10, Article I of the Federal Constitution, and the due process clause of the Fourteenth Amendment to that Constitution, is utterly unsubstantial and frivolous, as disclosed by the record and the decisions of this Court. The record discloses no Federal question. On the other hand, the record demonstrates, we think, the absolute soundness of the decision of the State Supreme Court of Appeals, of which complaint is made.

Wherefore, it is submitted that the writ of certiorari as prayed for should be promptly denied by this Court.

Respectfully submitted,

ERNEST K. JAMES,
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